

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALMA ENCINAS

Claimant

VS.

EXCEL CORPORATION

Respondent

AND

LUMBERMEN'S UNDERWRITING ALLIANCE

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 175,767

ORDER

Claimant appeals from an award entered by Administrative Law Judge Thomas F. Richardson on January 26, 1995.

APPEARANCES

The claimant appeared by and through her attorney, C. Albert Herdoiza of Kansas City, Kansas. The respondent and its insurance company appeared by and through their attorney, David J. Rebein of Dodge City, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, David J. Heinemann of Garden City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed the record listed in the award and has adopted the stipulations listed in the award. The Appeals Board has also reviewed and considered the deposition of Marianne Katherine Lumpe taken July 29, 1994. Although this deposition was not listed in the Award as part of the record, it was listed in the submission letter by respondent.

ISSUES

- (1) Whether the Administrative Law Judge correctly determined the nature and extent of the claimant's disability.
- (2) Whether one-half of certain deposition charges should be assessed against the claimant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- (1) The Appeals Board finds that claimant is entitled to benefits based upon a 46.5 percent work disability.

Claimant is a 39-year-old who moved from Mexico to work for respondent. Her work involved using an air knife to remove meat from bones. She also bagged the meat and then put the bags into boxes. She seeks benefits for repetitive motion injury from December 1992 through January 1993.

Claimant initially worked for respondent from May 1989 to May 1990. During that time she developed problems with her hands, elbows and shoulders. Claimant testified that following the first period of employment she was told that she would be affected by the cold and should avoid working in cold environments.

When claimant returned from Mexico, respondent initially would not hire her and she then went to work for IBP in Nebraska. While working for IBP, she again experienced problems with her hands and arms. She worked there from March 1991 to May 1992 when she returned to work for respondent in Dodge City, Kansas.

While working for respondent from December 1992 to January 1993, claimant suffered additional problems with her hands and arms. Respondent provided medical treatment at the direction of Dr. C. Reiff Brown. Dr. Brown diagnosed bilateral overuse problems involving the biceps tendon in front of the rotator cuff, tendons bilaterally, the lateral humeral epicondyle bilaterally and flexor tendons of the finger bilaterally. He rated claimant as having a 5 percent permanent partial impairment of the body as a whole. He eventually retracted the diagnosis of tendinitis in the hands and elbows. He recommended she avoid repeated use of the arms above shoulder level and repeated use at waist level significant to acquire abduction or flexion of the humerus away from the body of greater than 60 degrees.

Claimant was also evaluated by Dr. Edward Prostic. He concluded she has a 10 percent permanent partial impairment to the body as a whole. He indicated he would restrict her from overhead use of the hands or forceful use of the shoulders and would recommend that she avoid repeated or forceful use of her hands.

Dr. Brown released claimant to return to work in July 1993. At that time she was given a tour of the plant by respondent's workers compensation coordinator. The purpose of the tour was to find a job that claimant felt she could do within the restrictions. In the course of that tour,

claimant mentioned to the company representative that she could not work in a cold environment because of a problem with her hands. Since this limitation had not previously been mentioned, respondent investigated and found that this limitation preexisted claimant's application for employment. Respondent concluded that claimant had falsified her application for employment and terminated her on that basis.

The Administrative Law Judge limited claimant's award to functional impairment. He concluded that claimant was terminated for problems unrelated to her injury. He also concluded that claimant could have continued to work for respondent within her restrictions. The Administrative Law Judge finally concluded claimant had not shown that she was entitled to work disability over and above functional impairment.

The Appeals Board disagrees with the decision to limit this award to functional impairment. Based upon the recommended restrictions and the testimony of two vocational experts, the Appeals Board concludes claimant has established a work disability. The Appeals Board concludes that claimant did not deliberately falsify her application for employment. The evidence indicates she does not understand English well enough to complete the application without assistance. Her testimony convinces the Appeals Board that she did not sufficiently understand the application and did not deliberately falsify the form. In addition, the Appeals Board concludes this is not a case for application of the principles of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995). The Foulk decision involved a claimant who, after the injury, refused employment. It appeared that claimant's conduct in that case was designed to manipulate the award of benefits. We do not find that to have been claimant's intent in this case.

Both parties have presented testimony of vocational experts who render opinions indicating claimant has a work disability. Respondent presented the testimony of Marianne Katherine Lumpe and claimant presented the testimony of Michael Dreiling, both considered restrictions recommended by Drs. Prostic and Brown.

Claimant objects to consideration of the testimony of Marianne Lumpe, asserting that she does not qualify as an expert to give opinions on loss of access to the labor market and loss of ability to earn comparable wages. After reviewing her qualifications and the testimony relating to her experience, the Appeals Board finds that she does have the education and work experience which qualifies her to give such testimony. She has a master's degree in guidance and counseling from the University of Missouri in Kansas City. She has work experience in counseling, vocational assessment and placement. She is certified as a rehabilitation counselor. She has done work providing vocational assessments for federal workers compensation and job placement with the Veterans Administration. In addition, the methodology she followed is consistent with that followed by other experts providing testimony and opinions on work disability.

After reviewing the depositions of both Ms. Lumpe and Mr. Dreiling, the Appeals Board concludes that it is reasonable in this case to give equal weight to both opinions. Ms. Lumpe

testified that, in her opinion, claimant has an 11 percent loss of access to the open labor market. Michael Dreiling, on the other hand, testified, in his opinion, she has a 62 percent loss of access to the open labor market. Based upon these opinions, the Appeals Board finds that claimant has a 36.5 percent loss of access to the open labor market.

Both experts also testified to claimant's loss of ability to earn comparable wages. Ms. Lumpe testified that claimant was likely to be able to earn \$4.60 per hour after the injury. Mr. Dreiling testified that, in his opinion, she would be able to earn \$4.25 per hour. When Ms. Lumpe's post-injury wage is converted to a weekly wage and compared to the stipulated average weekly wage at the time of the injury, the result shows a 55 percent loss of ability to earn comparable wage. A similar comparison for Mr. Dreiling's projected post-injury wage of \$4.25 yields a 58 percent loss of ability to earn a comparable wage. Giving equal weight to both opinions, the Appeals Board finds claimant suffered a 56.5 percent loss of ability to earn a comparable wage. The Appeals Board also considers it appropriate to give equal weight to both factors, loss of wage and loss of access to the open labor market. The result in this case is a 46.5 percent work disability which the Appeals Board finds to be the disability suffered by claimant as a result of the injury.

(2) The Appeals Board finds that the assessment of costs provided in the Award by the Administrative Law Judge should be affirmed.

Claimant argues that the Court erred in requiring claimant to pay one-half of the deposition costs of Dr. C. Reiff Brown. K.S.A. 1992 Supp. 44-555 allows the Administrative Law Judge to assess all or part of a certified court reporter's fees to any party of the proceeding. In this case, the Administrative Law Judge did assess those costs in part to the Workers Compensation Fund, in part to the respondent, and finally, one-half of the cost of the deposition of Dr. Brown to be paid by the claimant. Neither statute nor rules provide any direction to assist in determining which of the parties should be ordered to pay the costs. In this case, the Administrative Law Judge has exercised his authority in assessing those costs and the Appeals Board finds he did so in a reasonable manner and affirms that assessment.

AWARD

WHEREFORE, the Appeals Board finds that the Award of Administrative Law Judge Thomas F. Richardson should be, and the same is hereby, modified to an award of 46.5% disability.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Alma Encinas, and against the respondent, Excel Corporation, a self insured, for an accidental injury which occurred January 31, 1993 and based upon an average weekly wage of \$409.08, for 415 weeks at the rate of \$126.82 per week for a 46.5% permanent partial general body impairment of function, making a total award of \$52,630.30.

As of October 1, 1996, there is due and owing claimant 191.29 weeks of permanent partial disability compensation at the rate of \$126.82 per week or \$24,259.40, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$28,370.90 is to be paid for 223.71 weeks at the rate of \$126.82 per week, until fully paid or further order of the Director.

An award is entered in favor of the respondent and against the Kansas Workers Compensation Fund for an amount equal to 50% of all sums heretofore paid to or on behalf of claimant by the respondent and the Fund is ordered to pay 50% of the remaining award directly to the claimant.

Claimant's contract of employment with her attorney is approved subject to the provisions of K.S.A. 44-536.

Future medical expenses and vocational rehabilitation benefits will be authorized only upon proper application to and approval by the director.

Fees and expenses of administration of the Kansas Workers Compensation Act are assessed against the respondent (50%) and the Kansas Workers Compensation Fund (50%) to be paid direct as follows:

Tri State Reporting Regular Hearing	\$430.90
Theresa M. Taylor Deposition of Dr. Prostic	\$180.40
Theresa M. Taylor Deposition of Michael Dreiling	\$577.80
Underwood & Shane Deposition of Susan Stephens	\$411.50
Underwood & Shane Deposition of Dr. Brown	\$325.25

One-half of the deposition costs of Dr. Brown are assessed to the claimant to be reimbursed to the respondent in the sum of \$325.25.

IT IS SO ORDERED.

Dated this ____ day of September 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: C. Albert Herdoiza, Kansas City, KS
David J. Rebein, Dodge City, KS
David J. Heinemann, Garden City, KS
Kenneth S. Johnson, Administrative Law Judge
Philip S. Harness, Director